**PP**

**v.**

**LEE HOCK LAI**

HIGH COURT, JOHOR BAHRU
KP GENGADHARAN NAIR JC
[CRIMINAL TRIAL NO: MT(3) 45-25-2001]
18 SEPTEMBER 2003

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking in 99g of monoacetylmorphines - Prima facie case, whether made out - Presumption of trafficking under s. 37(da), whether 'actual possession' and 'knowledge' of drugs must be proved first - Whether 'knowledge' of drugs could be inferred from conduct of accused at time of arrest - Discrepancies in evidence respecting weight of seized substance - Whether drug-exhibits produced in court were the substance seized from accused - Safekeeping and photographing of seized substance by police, whether chain of evidence broken - Breach of 'best evidence' rule - Chemical analysis of substance - 'Ten percentum' rule - 'Receptacles' - Amount of substance to be analysed - Section 37(j)*

***CRIMINAL PROCEDURE:*** *Prima facie case - Maximum evaluation, meaning of - Whether prosecution's evidence must be scrutinised properly and completely and not perfunctorily or cursorily - Whether doubts revealed in prosecution's case - Whether defence could be called to clarify doubts in prosecution's case*

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 37(da) - Presumption of trafficking - Principles and application - Meaning of 'found in possession' - Whether prosecution must prove 'actual possession' and 'knowledge' of drugs - Conduct of accused at time of arrest, whether indicative of 'knowledge' of drugs - Whether 'presumption of possession' under s. 37(d) could be relied upon to invoke 'presumption of trafficking' under s. 37(da)*

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 37(j) - Presumptions in analysis - 'Ten per centum' rule - Whether only applicable when substance suspected of being a dangerous drug is contained in a 'number of receptacles' - Whether rule refers to percentage of number of receptacles or percentage of content (weight) of receptacles - Whether a 'plastic packet' is a receptacle - Amount of substance to be analysed - Whether must be whole of substance (100%) in receptacle - Whether acceptable to analyse 10% of homogenised substance contained in receptacle*

***WORDS & PHRASES:*** *"receptacles" - Dangerous Drugs Act 1952 - Section 37(j) - Meaning of - Whether a 'plastic packet' is a receptacle - 'An object used to contain something'*

The accused was charged with trafficking in a dangerous drug, to wit, 99g of monoacetylmorphines, under s. 39B(1) of the Dangerous Drugs Act 1952 ('DDA'). At the close of the case for the prosecution, it was submitted, for the accused, that the prosecution had failed to make out a *prima facie* case against the accused. It was contended that: (i) there were serious doubts as to the identity of the exhibits (drugs) produced by the prosecution in court; (ii) there were infirmities in the evidence of the chemist; (iii) there was no evidence of possession; and (iv) the prosecution did not follow the 'best evidence' rule.

**Held (prima facie case not made out):**

**[1]** A 'maximum evaluation' of the prosecution's evidence after the conclusion of its case means a proper and complete evaluation of all the evidence adduced in order to determine whether a *prima facie* case has been made out against the accused. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a *prima facie* case has not been made out. The defence ought **not** to be called merely to clear or clarify such doubts. (pp 66 h & 67 a-b)

**[2]** The prosecution had sought to invoke the 'presumption of trafficking' under s. 37(da) DDA. Accordingly, it could **not** rely on the 'presumption of possession' under s. 37(d) DDA to invoke the 'presumption of trafficking' under s. 37(da) DDA, but must, instead, prove that the accused was in 'actual possession' of the dangerous drugs. As a result, the prosecution must establish, either by direct evidence or through evidential inferences, that the accused had 'knowledge' of the drugs. (pp 67 e-f & 68 f)

**[2a]** The fact that the accused had left the box (allegedly containing the dangerous drugs) unguarded in the open-basket of his motorcycle (parked in a public place) and had gone to a restaurant – would lead to the inference that he had no knowledge that there were drugs in the said box. Besides, even if the accused had custody of the impugned box, he did not have physical control over it at the time when it was left in the open-basket of his motorcycle. Furthermore, the inconsistent testimonies of the arresting officers also made it unsafe to rely on the conduct of

the accused – at the time of his arrest – as indicative that he had knowledge of the drugs. Consequently, the accused could **not** be said to have been 'found in possession' of the drugs (and therefore presumed to be trafficking in them) within the terms contemplated by s. 37(da) DDA. (pp 72 a-f, 73 d-e & 74 c-d)

**[3]** The chemist stated that the gross weight of the substance that he had examined was 932.9g of monoacetylmorphines. The investigating officer, however, testified that it was 932.0g. On the other hand, the original charge sheet in the committal proceedings stated the gross weight of the drugs as 923.0g of heroin. These discrepancies were not explained by the prosecution. Furthermore, there was uncertainty as to when the alleged drugs were photographed by the police and where they were kept after being photographed before being sent to the chemist. This gap or break in the chain of evidence had cast a doubt on whether the drug-exhibits produced by the prosecution in court were the ones seized by the police earlier. (pp 74 e-f, 75 a-b, e-f, 76 b-d & 77 b-d)

**[4]** The non-production of the impugned motorcycle as well as of the police-report of its loss was an obvious breach of the 'best evidence' rule, the benefit of which must go to the accused. (p 75 g)

**[5]** The 'ten per centum' rule embodied in s. 37(j) DDA only comes into play if the substance suspected of being a dangerous drug is **contained in a number of receptacles.** Additionally, the rule applies only with reference to the percentage of the **number** of receptacles and **not** the contents (weight) of the receptacles. For this reason, s. 37(j) DDA was **not** applicable in the instant case. (pp 78 f-h & 79 a-b)

**[5a]** A 'plastic packet' containing any substance suspected of being a dangerous drug is a 'receptacle' within the meaning of s. 37(j) DDA. (p 79 c-g)

**[5b]** Homogenising the substance contained in a receptacle and taking representative samples therefrom for chemical analysis is **not** the same as analysing the entire contents of the said receptacle. For the purposes of s. 37(j) DDA, a chemist must analyse the whole of the substance (100%) in the receptacle, and if not, at least a minimum of 10% of the homogenised substance. The chemist in the instant case had failed to comply with this requirement. (p 80 b-f)

*[Accused acquitted and discharged.]*

**Case(s) referred to:**
*Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC* ***(refd)***
*Chan Pean Leon v. PP [1956] 22 MLJ 237* ***(refd)***
*Loo Kia Meng v. PP [2000] 3 CLJ 653 CA* ***(refd)***
*Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(refd)***
*Mohamed Ali v. PP [1962] MLJ 230* ***(refd)***
*Muhammed Hassan v. PP [1998] 2 CLJ 170 FC* ***(refd)***
*Munusamy v. PP [1987] 1 MLJ 492* ***(refd)***
*PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC* ***(refd)***
*PP v. Lai Ching Chong [1997] 1 JCR 234* ***(refd)***
*PP v. Mohd Farid Mohd Sukis & Anor [2002] 3 CLJ 3457 HC* ***(refd)***
*PP v. Mok Kar Poh [2001] 5 CLJ 206 HC* ***(refd)***
*PP v. Tan Hock Beng [2002] 3 CLJ 177 HC* ***(refd)***
*Rusnani Yaakob [1996] MLJU 569* ***(refd)***
*Shamsudin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428* ***(refd)***
*Sia Soon Suan v. PP [1966] 1 MLJ 118* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code (Act 593), s. 180
Dangerous Drugs Act 1952, ss. 37(da), 37(j)

*For the prosecution - Ahmad Zubir Jantan DPP*
*For the accused - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co*

*Reported by Gan Peng Chiang*

## JUDGMENT

**KP Gengadharan Nair JC:**

The charge against the accused was one of trafficking in dangerous drugs and was framed as follows:

> Bahawa kamu pada 29 Mei 2000 jam lebih kurang 8.00 malam di Restoran Ayub, Jalan Ros Merah 2/1, Taman Johor Jaya di dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya iaitu 99 gram monoacetylmorphines dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) akta yang sama.

The accused claimed trial to the charge.

However, the initial charge against the accused as per charge sheet (D13) in the committal proceedings in the Sessions Court stated the dangerous drug as being "heroin" and its weight as "923" grams.

This description of the drug and the weight also became issues relied upon by the defence at the end of the prosecution's case to support its argument that the drug exhibits produced in court were not the ones seized on 29 May 2000.

**The Facts**

The facts of the case, briefly, are that in the evening of 29 May 2000, acting on information received that some activities in relation to dangerous drugs would be taking place later that day at a restaurant known as Restoran Ayub at Jalan Ros Merah 2/1, Johor Jaya, Johor Bahru, 8 plain clothed police officers in 3 teams proceeded to the area and took up positions. One of the teams was led by Chief Insp. Zambri bin Rasab (PW5). Detective Sarjan Rasak (PW6) and a Lance Coporal named Nordin were also in that team. This team took up a position beside Restoran Ayub. According to the testimony of PW5 and PW6, at about 8pm they saw the accused riding a motorcycle bearing registration number JFS 4863 ride up to the back of the restaurant. The motorcycle had a basket in front and in its was a telephone box words "Up 2 You" on it. They could see the box clearly as the area was well lit. The accused parked the motorcycle at the back of the restaurant, in the open, leaving the telephone box in the basket of the motorcycle. He then went up some steps into the restaurant and sat down at one of the tables alone. PW5 and PW6 then approached the accused and PW5 introduced himself as a policeman by showing his authority card. According to him the accused appeared to be shocked and he proceeded to search the accused but did not recover anything from that search. When PW5 was making the search PW6 and Lans Kopral Nordin were holding the accused because the accused was struggling.

PW5 and his team recovered one key for the motorcycle (JFS 4863) and a road tax for the motorcycle which were placed on the table in front of the accused. PW5 seized both the items. He then, together with PW6 and L/Kpl Nordin, subsequently led the accused to the accused's motorcycle which was parked (about 5 meters away) behind the said restaurant. There was a handphone box with the words "UP 2 YOU" on it inside the basket of the said motorcycle. He immediately took the said box and opened it in front of the accused. There were two packages wrapped with the Chinese newspaper in it. Upon unwrapping he saw two plastic packets containing a yellowish substance suspected to be heroin. He then arrested the accused and instructed PW6 to handcuff the accused.

PW5 instructed a L/Kpl Payaman to take the motorcycle (JFS 4863) to the police station. Thereafter, he and all the policemen together with the accused went back to the police station (IPK Johor) at about 9pm. Upon reaching his office PW5 took the drug exhibits and the accused into his room at the Narcotics Department. He then marked the drug exhibits by putting his signature and the date "29 May 2000" on them that same night before locking them up in a cabinet, after which he had made a police report. He then informed ASP Nordin (PW4) the investigating officer about the matter. On the next day ie, 30 May 2000 he delivered the exhibits which he had seized to PW4 and also informed him that the accused was in the lockup.

The drug exhibits were sent to the chemist by the PW4 on 1 June 2000 for analysis.

The motorcycle (JFS 4863) and its key were not produced by the prosecution at the hearing as, according to the Investigating Officer (PW4), they were lost. Further, the police report in respect of this loss was also not produced at the trial. Only photographs taken of a motorcycle bearing registration No. JFS 4863 were produced together with the negatives.

At the end of the prosecution's case the learned defence counsel submitted that the prosecution had not made out a *prima facie* case arguing that:

1. there were serious doubts as regards the identities of the exhibits.
2. there were infirmities in the evidence of the chemist.
3. that there was no evidence of possession.
4. that the prosecution had not followed 'the best evidence' rule.

After considering the submissions by both the defence and the prosecution I held that the prosecution had not made out a *prima facie* case and accordingly acquitted and discharged the accused.

**Onus On The Prosecution**

Section 180 of the Criminal Procedure Code (Act 593} is quite clear that the onus is on the prosecution at the end of its case to make out a *'prima facie'* case to warrant the calling of the defence of the accused. What is *'prima facie'* has been discussed in several cases.

Augustine Paul, J (now JCA), said in *Public Prosecutor v. Dato Seri' Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 at p. 275 as follows:

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

In *PP v. Mok Kar Poh* [2001] 5 CLJ 206 at pp. 209-210, Zainun bte Ali J referred to "*prima facie* case" as:

> A case which is sufficient to call for an answer. It is also recurrent in all these authorities that although not conclusive, it is incumbent that there be credible evidence on each and every essential ingredient of the offence. As had been further emphasised in *PP v. Ong Cheng Heong* [1998] 4 CLJ 209, "credible evidence is evidence which has been filtered and which has gone through the process of evaluation".

Then in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, the Court of Appeal speaking through Gopal Sri Ram, JCA explored the test at some length and had this to say:

> In our judgment Parliament by the phrase *"prima facie"* case intended to reverse the majority of the Federal Court in *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 and to statutorily codify the minority view in that case. The majority view in *Arulpragasan* was in the main a criticism directed at the opinion expressed by Lord Diplock in *Haw Tua Tau v. Public Prosecutor* [1981] 2 MLJ 49. In *Haw Tua Tau*, Lord Diplock appears to have equated trials before a judge and jury to trials before a judge sitting alone.
>
> Now, in a trial by judge sitting with a jury, the judge is the decider of law but the jury is the decider of fact. Quite the contrary in trials before a judge sitting alone. In the latter the judge is both decider of fact and law. We therefore find ourselves in agreement with the majority in *Arulpragasan* (speaking through his lordship Justice Edgar Joseph Jr, FCJ) that it is absurd in the context of our jurisdiction to equate the two situations.
>
> There is nothing in the amended s. 180 of the Criminal Procedure Code which reflects an intention in Parliament to create such an equation. Accordingly, in our judgment, under s. 180 as presently constructed it is a duty of a judge sitting alone to determine at the close of the prosecution's case, as a trier of fact, whether the prosecution has made out a *prima facie* case.

The judgment goes on to state as follows:

> We find a careful reading of the majority view and the minority view respectively in *Arulpagasan* in reality and for all practical purposes produces the same result. According to the majority if at the close of the prosecution case two or more inferences may be drawn from the prosecution evidence then the inference most favourable to the accused must be drawn. In that event the prosecution would not have proved its case because there would be a reasonable doubt. That is indeed, the position in law.
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> Thus in *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105 the Malayan Court of Appeal speaking through Spenser Wilkinson J said (at p. 108):
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> Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.
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> An illustration of this principle is to be found in the case of *Public Prosecutor v. Kasmin bin Soeb* [1974] 1 MLJ 230. In that case the accused was charged under an alternative charge for having commited an offence under s. 411 of the Penal Code. According to the prosecution, the accused had dishonestly retained stolen property to wit, a Honda generator knowing or having reason to believe the same to be stolen property. The only evidence adduced connecting the accused to the crime was the fact that 3 days after the theft he led the police to a place from where the generator was recovered. At the close of the prosecution's case the magistrate acquitted the accused. The prosecution then appealed. The High Court dismissed the appeal. Mohd Azmi J (as he then was) when delivering his oral judgment said this:
>
> > As far as leading the police to the place of discovery was concerned, there were at least two inferences that could be drawn in the absence of information given by the accused. Either the accused himself had hidden the stolen property there or he had come to know of its whereabouts through a third person. In a criminal case, the inference favourable to the accused should be drawn. Under the circumstances, the appeal is dismissed and the order of discharged and acquittal be affirmed.
>
> It is noteworthy that *Kasmin bin Soeb* was decided at a time when s. 173(f) of the Criminal Procedure Code was in its un-amended form and hence contained the expression "would if unrebutted warrant his conviction". The exercise in which s. 180 was amended also resulted in an amendment to s. 173(f) which now uses the phrase *"prima facie"*.

It is also clear from the judgment of Edgar Joseph Jr FCJ in *Arulpragasan* that what the majority was supporting was a maximum evaluation of the prosecution evidence. This is made clear in the following passage in the judgment of that very learned judge at p. 647 of the report:

> Further more, if the onus on the prosecution at the close of its case, is to establish a 'mere prima case', the test to be applied is a minimal evaluation of the prosecution's evidence to ensure that it is not inherently incredible (see *Haw Tua Tau v. PP*). Whereas, if the onus on the prosecution at the close of its case, is to establish a case 'beyond all reasonable doubt', then the test to be applied to the prosecution's evidence is a maximum evaluation of the prosecution's evidence, which calls for 'a more rigorous test of credibility' (per Lord Diplock in *Haw Tua Tau* at p. 54G), in order to answer the question: if there is no more evidence, has the prosecution proved its case beyond all reasonable doubt? (See *PP v. Fong Ah Tong & Anor* [1940] MLJ 240). (emphasis added)

This is the same proposition that was laid down in *Khoo Hi Chiang supra* at p. 172:

> Consequently, the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in oder to determine whether or not the prosecution evidence is inherently incredible – the *Haw Tua Tau* test – but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

It would appear that a comparison between the passage earlier quoted from the minority judgment of Mohd Azmi FCJ and that of Edgar Joseph Jr FCJ, reveals no serious difference of opinion between them as to rigour with which the prosecution's evidence is to be examined. Hence, it is our respectful view that the difference of opinion, if any – and we hasten to add that we are unable to see any – between the majority and minority in *Arulpragasan* is not one of substance but of mere form. Both the majority and minority insist on a maximum evaluation of the prosecution evidence at the close of the prosecution's case. If there are gaps in the evidence (See *Abdullah Zawawi v. Public Prosecutors* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19) or the evidence admits of more than one inference *(Kasmin bin Soeb, supra)* then, applying either the view of the majority or the minority in *Arulpragasan*, the result would be the same in that the accused would be entitled to an acquittal at the close of the prosecution's case.

In our respectful view the correct test to be applied in determining whether a *prima facie* case has been made out under s. 180 of the Criminal Procedure Code (and this would apply to a trial under s. 173 of the code) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 MLJ 232 at 270:

> To summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a *prima facie* case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to so even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of s. 34 of the Penal Code? My answer to the question is in the negative.

We are confident in the view we have just expressed because we find nothing in the amended s. 180(1) of the Criminal Procedure Code that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language empoyed by it to show that there should be a dual exercise by a judge under s. 180 when an accused elects to remain silent as happened in *Pavone v. Public Prosecutor* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s. 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.

It therefore follows that there is only one exercise that a judge sitting alone under s. 180 of the Code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to a maximum evaluation and ask himself the question: If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an equittal.

In my view the "maximum evaluation" refers to a proper and complete evaluation of all the evidence adduced to determine whether a *prima facie* case has or not been made out. Thus, all the evidence adduced has to be scrutinised properly and this should not be just a perfunctory, cursory evaluation or an exercise of skimming over the surface of the evidence only. The prosecution must make out the ingredients of the charge with the evidence adduced. If the evaluation of the evidence results in doubts in the prosecution's case at this

stage of the proceedings itself then it cannot be said that a *'prima facie'* has been made out. The defence ought not to be called merely to clear or clarify the doubts. The benefit of the doubt, if any, at the end of the prosecution's case must go to the accused.

Section 180 of the Criminal Procedure Code requires the court to "consider" whether the prosecution has made out a *prima facie* case against the accused. This consideration must be the total evaluation of the evidence adduced up to that stage. The degree of evaluation ie, whether it should be a "maximum" or "minimum" one is not provided for but that, to my mind, would mean the court has to carefully and attentively consider all the evidence and thus would require a complete and full evaluation of the evidence.

As stated by Ong Hock Thye Ag. CJ (Malaya), (as he then was), in *Sia Soon Suan v. PP* [1966] 1 MLJ at p. 118 "the requirements of strict proof in criminal cases cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must based on evidence adduced and nothing else".

The prosecution, in its opening address, stated that it was relying on s. 37(da) of the Dangerous Drugs Act 1952 (DDA) in this case. It, thus, had to prove possession (as envisaged by s. 37(da)) of the dangerous drug by the accused. Unlike s. 37(d) of the DDA which refers to the "deeming" only of possession where a person is found to have had in his custody or under his control a dangerous drug, s. 37(da) refers to a presumption of trafficking in a dangerous drug when there is infact a finding of actual possession (not a deemed or presumed one) of a dangerous drug as provided therein. This necessarily implies that the possessor must have knowledge of what is being possessed. The difference between s. 37(d) and s. 37(da) of DDA was explained by Chong Siew Fai CJ (Sabah & Sarawak), (as he then was), in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170 at p. 190 as follows:

> In our view, there is a clear undeniable distinction between the word 'deemed' used in s. 37(d) and the word 'found' employed in s. 37(da) of the Act. The 'deemed' state of affairs in s. 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da) are sometimes described as 'compelling presumption' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court

must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s. 37(da) connotes a finding after a trial by the court.

Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s. 37(d) of the act and those required to raise 'presumed ... trafficking' under s. 37(da) are different. To come to the presumption of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

In our view, to constitute 'possession' under s. 37(da) of the act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

Thus, to make out a *prima facie* case the prosecution has to first establish that the accused was in actual possession of the dangerous drug before invoking the aid of s. 37(da) of the DDA for the presumption of trafficking in a dangerous drug to arise. The prosecution has also to establish that the accused had knowledge of the drugs so possessed. To succeed in this there must either be direct evidence of knowledge or inferred knowledge by drawing the necessary inferences from the evidence adduced.

Ong J (as he then was) cautioned in *Mohamed Ali v. PP* [1962] MLJ 230 that:

Presumption of facts must not be drawn automatically, or, as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumption of law, Devlin LJ said recently in *Berry v. British Transport Commission* (4):

> ... Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable – in the sense that 'estoppels are odious', and the doctrine should never be applied without a necessity for it; per Bramwell LJ *Baxendale v. Bennett* – because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.

"Possession" was defined by Thomson J in *Chan Pean Leon v. Public Prosecutor* [1956] 22 MLJ 237 in the folowing terms:

> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, page 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proven by direct evidence. It can only be proved by inference from the surrounding circumstances.

Thus, it was necessary in the present case to determine whether the accused was in actual possession of the dangerous drug as per the charge against him ie, whether he had custody and control with the required knowledge (or inferred, as the case maybe) that he was in possession of a dangerous drug but it need not be knowledge of the type, name or nature of the drug.

Augustine Paul J (as he then was) stated in *PP v. Mohd Farid bin Mohd Sukis & Anor* [2002] 3 AMR 3457 at p. 3482 as follows:

> The further element that requires proof is that he had knowledge that it was cannabis. As I said in *PP v. Chia Leong Foo* [2000] 6 MLJ 705 in reliance on cases such as *Chan Pean Leon v. PP* [1956] MLJ 237, *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585 and *PP v. Phua Keng Tong* [1986] 2 MLJ 279 proof of knowledge is very often a matter of inference. I consider it necessary to repeat what Thean J (as he then was) said in *PP v. Phua Keng Tong* [1986] 2 MLJ 279 at p. 286:

> However, in this case, like in many others, proof of knowledge or belief on the part of an accused is a matter of inference from facts. In that case of *RCA Corp v. Custom Cleared Sales Pty Ltd* [1978] FSR 576; 19 ALR 123, the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright said at p. 478, 'Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case'.

And the court further said, at p. 579:

> It seems to us that the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of person in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge.

It must be observed that in proving this element the obligation of the prosecution is only to establish that the accused had knowledge, either by direct evidence or by way of inference, of the existence of the dangerous drug but not its qualities. This stand has been consistently taken by the Singapore Courts following *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256 which was approved in *Tan Ah Tee & Anor v. PP* [1980] 1 MLJ 49. It is sufficient for me to refer to sim *Teck Ho v. PP* [2000] 4 SLR 39 where Yong Pung How CJ said at pp. 42-43:

> The appellant was charged with trafficking in a controlled drug, an offence under s. 5(1)(a) of the Misuse of Drugs Act (Cap 185) ('the act'). Section 5(2) of the act states that a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking. Section 17(c) of the Act provides a presumption concerning trafficking. It states that any person proved to have possession of more than 2g of diamorphine shall be presumed to have that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.

The key issue in this appeal was whether the trial judge was right in finding that the appellant was in possession of the diamorphine contained in the bag. Numerous cases have established that possession encompasses the element of physical control as well as an element of knowledge. For example, in *Fun Seong Cheng v. PP* [1997] 3 SLR 523, it was said by Karthigesu JA, in delivering the judgment of the Court of Appeal:

> 54 ... Clearly in order to prove that the appellant was in possession, he must have physical control over the drugs. It is a matter of fact whether someone had physical control over an item ...
>
> 54 ... Physical control is not enough for the purpose of proving possession. There needs to be *mens rea* on the part of the accused.

Karthigesu JA went on cite a portion of Lord Pearce's judgment in *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256, a decision of the House of Lords which involved the meaning of 'possession' for the purpose of s. 1 of the Drugs (Prevention of Misuse) Act 1964. Lord Pearce's *dicta* had been cited in extensio with approval by the Court of Appeal in *Tan Ah Tee v. PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. Wee Chong Jin CJ in delivering the judgment of the court, said that the word 'possession' for the purpose of the Act should be construe as Lord Pearce had construed it. His Lordship had said in *Warner*:

> One may therefore, exclude from the 'possession' intended by the Act the physical control of articles which have been 'planted' on him without his knowledge. But how much further is one to go? If one goes to the extreme length of requiring the prosecution to prove that "possession" implies a full knowledge of the name and nature of the drug concerned, the efficacy of the Act is seriously impaired, since many drug pedlars may in truth be unaware of this. I think that the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse.

Therefore, in order to prove possession, the prosecution must prove that there is first, physical control over the controlled drug, and second, knowledge of the existence of the thing itself, that is the existence of the controlled drug, but not the name nor nature of the drug.

As I explained in *PP v. Chia Leong Foo* [2000] 6 MLJ 705 it is only when there is no direct evidence from which the necessary inference can be made can the court resort to presumptions.

The drug in the present case was contained in 2 plastic packets (wrapped with a newspaper) in a closed mobile telephone box (exh. P4A) with the words – "Up 2 You" on it which was in an open basket attached to the accused's motorcycle. The motorcycle, with the box in it, was left in an open area in full view of passers by when the accused parked his motorcycle and went into the restaurant called "Restoran Ayub". He did not take the box with him into the restaurant. If the box contained drugs and were presumely valuable to the accused it would be fair to infer that he would have taken the box with him into the restaurant and not leave it lying in an open basket of his motorcycle in the open in a public place with people moving about. In fact a telephone box (of a handphone) left like that could be attractive to thieves and be easily snatched or stolen from the basket.

The fact that the accused left the box unguarded in the open basket of his motorcycle in a public place leads to the inference that he had no knowledge that there were drugs in the box. This also appears to tie in with the accused's defence put to the prosecution witneses (but denied by them) that the telephone box belonged to one "Ah Woon" who had allegedly been given a ride as a pillion on the accused's motorcycle and who had allegedly got off the motorcycle before the accused reached the Restoran Ayub.

Further, even if the accused had custody of the box and its contents he did not have physical control over it when it was left in an open basket in a public place away from the accused and easily accessible to others. The prosecution did not adduce any evidence, although there were 3 teams of police in that operation, that they had observed the motorcycle during the time the accused was away from it whilst he sat in the restaurant and that no one approached the motorcycle or handled the box in the basket of that motorcycle between the period of the accused parking his motorcycle (leaving the box in it) and the time he was apprehened and escorted to the motorcycle. It appears that no one from any of the police teams, infact, watched the motorcycle between the time the accused left it and the time he was brought to it and arrested.

To infer knowledge of the drug on the part of the accused the prosecution relied on the conduct of the accused when he was approached by the arresting officers, PW5 & PW6. Chief Inspector Zambri (PW5) who was leading the 2nd team testified as follows in this regard:

> Semasa menghampiri OKT saya memperkenalkan diri dengan menunjukkan kad kuasa polis. Pada masa itu saya nampak OKT dalam keadaan tergamam melihat saya.

> Saya hendak membuat pemeriksaan badan terhadap OKT. OKT tidak beri kerjasama, dan saya mengarahkan dua anggota saya memegang OKT untuk membuat pememeriksaan badan. Pada masa itu OKT meronta-ronta.

However, PW6, Sarjan Abdul Rasak bin Othman who was also in the same team described it as follows:

> Apabila kami telah nampak subjek mengambil tempat di salah sebuah meja dan duduk di atas kerusi saya bersama D/L/Kpl Nordin yang di ketuai oleh Chief Insp. Zambri terus menghampiri subjek.
>
> Pada masa yang sama Chief Insp. Zambri telah kenalkan diri sebagai anggota polis kepada subjek.
>
> Pada masa itu saya lihat subjek dalam keadaan tergamam dan subjek juga dalam keadaan cuba melarikan diri. Ini berlaku pada masa Chief Insp. Zambri hendak menjalankan pemeriksaan.

Thus, whilst PW6 said that the accused tried to run when approached PW5 did not state so. This contradiction makes it unsafe to rely on the conduct of the accused as being indicative of guilt or knowledge that he was in possession of any dangerous drug.

According to PW5 the accused was only hand cuffed after being brought down to the motorcycle from the restaurant. PW6's evidence is that the accused tried to run or flee prior to his arrest. If indeed the accused had attempted to run it would be only logical that he would have been handcuffed then and there. I did not believe the evidence of PW6 about the accused attempting to run away. Be that as it may, even if the accused did infact attempt to run away, that, by itself, cannot lead to any adverse presumption against the accused.

KC Vohrah J (as he then was) was of the view in *PP v. Lai Ching Chong* [1997] 1 JCR 234 that:

> Even if there was a "slight struggle" stated by PW3 when the accused was being arrested or that he tried to "run away" (as PW3 stated under cross-examination), I would not read too much into these actions as these actions could be actions of an innocent man reacting to an unexpected and sudden confrontation.

Edgar Joseph, JR, SCJ speaking for the then Supreme Court in *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 4 CLJ 1 at p. 6 expresed his view thus:

> We now come to what does seem to us to be evidence of a potent kind against the appellant, namely his conduct in taking to his heels upon Insp. Mat Yusoff announcing the discovery of the drugs in the box. This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.
>
> On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only after Insp. Mat Yusoff announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way.

Apart from trying to draw an inference from the conduct of the accused the prosecution did not have any other evidence such as of any finger prints of the accused on the box or on the plastic packets containing the drugs to show some form of connection between the accused and the exhibits.

In the circumstances I found that there was no possession of the drug by the accused as envisaged by s. 37(da) of the DDA.

The defence also raised the issue of the identity of the drug exhibits in relation to the weight of the same, and of the break in the chain of evidence.

The chemist confirmed the gross weight of the substance containing the drug to be "932.9" grams. The Investigating Officer in the examination in chief confirmed and stated the gross weight as "932" grams. Neither the chemist nor the Investigating Officer stated that the weights were approximate or estimated. In the committal proceedings the original charge sheet stated the weight of the drug as being "923" grams. Between the evidence of the chemist and the original charge sheet in the committal proceedings, there is a discrepancy of 9.9 grams. Then, between the evidence of the Investigating Officer and the chemist there is a difference of 0.9g. The prosecution did not adduce any evidence to explain the discrepancy although the defence had put to the prosecution witnesses that the drug exhibits produced in court have been tampered with and were not the exhibits seized on 29 May 2000.

The Investigating Officer (PW4) testified that he received the drug exhibits from the arresting officer, PW5, on 30 May 2000. He weighed them and kept them in the original condition under lock and key. He marked on the exhibits and also took two photographs of the exhibits, and then on 1 June 2000 he sent the exhibits to the chemist (PW3).

The Investigating Officer did not testify that the drug exhibits were taken out on 31 May 2000 but the photographs (exh. P10(n) & (o)) were taken on 31 May 2000 as per the date appearing on the photographs. The prosecution did not adduce any evidence as to the time the exhibits were photographed and as to where they were kept after the photographs were taken. The photographs of the scene of the alleged offence and of the motorcycle involved were also taken on 31 May 2000. There is no evidence of where the drug exhibits were kept after being photographed and before being sent to the chemist on 1 June 2000. This gap has broken the chain of evidence thereby causing doubt as to whether the drug exhibits seized on 29 May 2000 which are the subject matter of the charge are the same exhibits produced and marked in court.

In *Shamsudin b. Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428, there was no explanation by the policeman who picked up drugs thrown out of a car as to what he did with the exhibits for a period of five hours before he handed them over to the Investigating Officer and Harun Hashim SCJ (as he then was) stated that this amounted to a serious gap in the chain of the evidence in respect of the drugs thrown out of the car and the exhibit which was produced in court and held that on this ground alone the appellant should not have been called upon to enter his defence.

The onus was on the prosecution to ensure that adequate evidence was led to show an unbroken chain of evidence in respect of the drugs exhibits, explain the discrepancies in the stating of the gross weight of the drug and the contradiction in the description of the drug as "heroin" in the charge sheet in the committal proceedings and the finding of the chemist that the drug was monoacetylmorphines. This was especially required when, in fact, the defence had alleged in the cross examination of the prosecution witnesses that the exhibits had been tampered with. This the prosecution failed to do thereby further contributing to and compounding the failure to make out a *prima facie* case.

The non production of the motorcycle (JFS 4863) or the police report about its loss is a breach of the best evidence rule, the benefit of which breach must go to the accused.

Then, there are the markings on the exhibits such as the newspaper (exh. P4A(M)) which was used to wrap the plastic packets containing the drug. The date written on the newspaper produced in the court as an exhibit is 20 May 2000 whereas PW5 the arresting officer (Chief Insp. Zambri) testified that the date that was written on the newspaper he seized was the date he seized them on ie, 29 May 2000.

Furthermore, each of the dates written on the plastic packets containing the drug and on the newspaper used to wrap the packets were written in three different coloured (red, black and blue) inks.

It is difficult to accept that the officer took three different pens, one after another, at one sitting, to write the dates on the three exhibits. Thus, in all probability the dates were written on three different occasions.

No evidence was adduced by the prosecution by way of explanation in respect of these matters. The prosecution in its reply to the submission of the defence on the different weights of the substance suspected to be dangerous drugs submitted that the difference of 0.9g in weight was a small matter and wanted to court to invoke the principle of the *"de minimis not curat lex"* and submitted that the date on the newspaper wrapping was a mistake in writing the date or in the words of the prosecution "dakwat tersebut telah luntur di kertas surat khabar itu".

I cannot except this explanation in submission when there is no evidence adduced by the prosecution to so submit. The submission that the difference of 0.9g in weight is a small matter is unacceptable in the light of the three different weights stated ie, to be "923" grams initially at the committal proceedings, as "932" grams by PW4 (the investigating officer) and as "932.9" grams by the chemist (PW3). The prosecution reffered to the case of *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, as regards the mistake in the date, wherein Mohamed Azmi SCJ stated (in respect of a clerical error resulting in an envelope containing the chemist's report to be addressed to the "OCPD of Sg. Siput" when it should have been addressed to the "OCPD Taiping') as follows:

> According to Mr. Gurubachan Singh the trial judge was wrong in accepting the evidence of prosecution witnesses that the reference to "Sungei Siput" was a typing error because by dispensing with the evidence of the typist who was available in court, an adverse inference under section 114(g) Evidence Act should have arisen against the prosecution. The answer must depend on whether the typist is really a material and important witness having regard to the whole chain of evidence on exhibits. The clerical error explanation by the investigating officer ASP Ahmad and Mr. Ng the government chemist, was considered and accepted by the trial judge, although the typist responsible for the error did not give evidence. The learned judge held that it was not essential to call the typist notwithstanding her presence in court. We find no valid reason to disagree with the learned judge's finding.

However, it is to be noted that in the aforesaid case there was an explanation given in evidence about the clerical error whereas in the present case the prosecution did not provide any such evidence through its witnesses.

Added to this, is the fact that original charge sheet in the committal proceedings referred to the drug as "heroin" whilst the amended charge against the accused and the evidence of the chemist was that the drug is "monoacetylmorphines". There is nothing in the original charge sheet to state that the drug was "suspected" to be "heroin". The defence inferred that there could be two different drugs and that it was probable that the alleged drug exhibits seized on 29 May 2000 were not the same ones produced in court in respect of the charge against the accused.

I had pointed out to the learned defence counsel when reference was made to the name of the dangerous drug (as appearing in the charge sheet) that at that initial stage of the proceedings the chemist would not have had analyzed the drug yet and thus, that by itself, cannot be fatal to the prosecution's case. However, when the discrepancy in the description is viewed in the light of the other discrepancies such as the weight, dating of the exhibits and the gap in the evidence of where the drug exhibits were kept after being photographed on 31 May 2000 and before being sent to the chemist on 1 June 2000, cumulatively, all these become more material in a case such as this which carries the death penalty on conviction.

**Chemical Analysis**

The chemist (PW3) testified that he conducted 4 tests on the 2 packets of drugs (P4A(K1) and P4A(M1)) handed to him by the investigating officer. For the Frodhes, Marquis and TLC test he took seven representative samples each weighing 1g from each of the packets ie, 7g in weight from each of the 2 packets. The nett weight of the 2 packets were 462.3g and 463.5g respectively. For the 4th test (the GC test) he took 0.6776g representing 0.14% from the packet weighing 462.3g and 0.6728g also representing 0.14% from the packet with nett weight of 463.5g.

Thus, the total percentage of the samples taken by the chemist from each of the packets for analysis was 0.14% which was much less than 10% of the weight of each of the packets. The defence submitted that this was not in accordance with s. 37(j) of DDA and that if 10% was not taken then 100% of the drugs ought to have been analysed by him.

Now, s. 37(j) of the DDA provides that:

> When any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten percentum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

In *Loo Kia Meng v. Public Prosecutor* [2000] 3 CLJ 653 the Court of Appeal interpreted s. 37(j) of the DDA 1952 to mean that a chemist has to take at least 10% of the substance suspected to be a drug for analysis to determine the nature and quantum of the drug in the substance.

My attention was also drawn to *PP v. Tan Hock Beng* [2002] 3 CLJ 177 wherein RK Nathan J referred to an analysis of some drugs by a chemist and said as follows:

> From the total initial weight of 223.6 grams of heroin PW2 the Chemist testified that he took 0.3863 grams for analysis whereas 10% of the total weight would have been 22.36 grams. In fact the chemist did not even take 1% which in itself would have been 2.236 grams. The accused is entitled to the best advantage which he had been sorely deprived of. When the minimum requirement was 10% the chemist took a sample of even less than 1% for analysing. Besides the chemist gave no reasons for failing to comply with the statutory requirement.

In my humble view the "10%" (ten percentum) referred to in s. 37(j) of the DDA appears to be applicable only if the substance suspected to be a drug is contained in a number of receptacles, and infact refers to the analysis to be carried out on the percentage (10%) of the number of receptacles and not 10% of the contents of the receptacles.

Section 37(j) does not state the percentage of the contents of each of the receptacles to be taken for analysis. It is to be noted that the subsection commences with the words "When any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles ..." Thus, if the substance is not contained in a "number" of receptacles then the 10% rule as set out in s. 37(j) of the DDA does not apply. I am supported in this further by that part of the said s. 37(j) wherein it is

stated that "it shall be sufficient to analyze samples of the contents of a number not less than ten percentum of such receptacles." The "such" receptacles refers to the "number of receptacles" stated in the proceeding phrase.

Further, the clauses following after the words "percentum of such receptacles" make it even more clear, that is, "if such analysis establishes ... it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed, ...", etc.

Thus, this s. 37(j) is only a presumption section where a number of containers are involved and in my view s. 37(j) is not applicable to the present case.

The prosecution in its submission raised an argument that the plastic packets containing the drug were not "receptacles" and therefore did not come within s. 37(j) DDA. It relied on *Pendakwa Raya lwn. Rusnani bte Yaakob* [1996] MLJU 569 wherein Nik Hashim PK (as he then was) held that a wrapping paper is not a container that can be called a "receptacle" thus holding that s. 37(j) of the DDA was not applicable. Following this the prosecution here argued that s. 37(j) of the DDA 1952 was not applicable to the present case as the section refers to "receptacles" and that plastic packets are not "receptacles". I am unable to accept this argument as the word "receptacles" in s. 37(j) refers to any container as generally understood. The prosecution referred to the *Consise Oxford Dictionary* meaning of the word "receptacle" as meaning "a containing vessel, place or space and submitted that plastic packets are not receptacles.

The *Oxford English Dictionary* (8th edn) describes "receptacle" more simply as "an object used to contain something". A plastic packet is an object used to contain or hold something and therefore quite clearly comes within the scope of the meaning of the word "receptacle". Thus, in my view, plastic packets or bags, etc, are receptacles.

Be that as it may, as I stated earlier, s. 37(j) of DDA is not applicable to the present case but not for the reason that plastic packets are not "receptacles".

The chemist, in his evidence, stated that he homogenized the contents of the two packets containing the drugs before taking the representative samples and that thus his analysis was infact of the entire packets ie, 100% of the contents.

In its submission in reply the prosecution argued that the chemist had homogenized the entire substance containing the drugs in both the plastic packets (K1 & M1) before taking the representative samples and that therefore the chemist had conducted an analysis of the entire substance ie, 100% of the

substance. The chemist in his evidence admitted in cross examination that he did not do any analysis for drugs in respect of the balance of the substance after he had taken the samples.

In my view homogenizing the packets of substance suspected to contain dangerous drug and taking 0.14% as sample for analysis is not the same as analysing the whole of the substance.

The question then, is how much of the substance suspected to be a dangerous drug must the chemist analyze to determine the drug and quantum present? In the absence of any statutory minimum it must be either the whole of the substance or at least a reasonable portion of the same. The chemist stated that the amount he took in the present case was sufficient and was in accordance with the practice of his department. He also said that his testing followed the guidelines set by the United Nations. No evidence was adduced as to how much of the substance must be taken for analysis following the practice or the guidelines.

Taking a cue from the requirement (in s. 37(j) of DDA) that at least 10% of the number of receptacles must be analyzed to raise the presumption that the balance of the remaining receptacles consist of the same proportion of drug it (10%) could, in my view, be extended to the very minimum percentage of sample to be taken for analysis for drugs in any receptacle or container. Thus, if the chemist does not analyze a hundred percent (100%) of the substance suspected to contain a dangerous drug then in such a case at least 10% of the substance (homogenized), as a very minimum, should be analyzed especially in a case were the results could mean the life or death (upon conviction) of an accused person. The chemist did not do so in the present case and therefore it would not be safe to presume by a mathematical computation that the total amount of monoacetylmorphines in the two packets in the present case weighed 99 grams.

In all the circumtances and based on the evidence adduced by the prosecution and/or lack of it I held that the prosecution had not made out a *prima facie* case against the accused to warrant the calling of his defence to the charge. Consequently, I acquitted and discharged the accused.